

Personal Social Media Use Raises Employment Issues

By Karen Kranson and Marisa Warren

As the use of social media becomes more prevalent, we as lawyers must advise clients and decide in our own lives how to navigate these new interactions: What information posted or accessed on the Internet can employees reasonably expect to be private, and what information can employers lawfully access? Is it appropriate to “friend” a coworker (or for that matter, an adversary, a witness, or a judge)? Should coworkers be “poking” one another? If you do not know what it means to friend or poke someone in a social media context, you soon will.

At the final plenary session of the 4th Annual Section Conference, participants learned about the range of issues implicated by the growing use of social media in a session titled “I Know What You Did Last Summer—Emerging Issues Raised by the Use of Social Networking Sites.” The speakers emphasized that the continued escalation of social media use presents new areas of concern for labor and employment lawyers in both their practices and private lives.

Dean Cynthia Nance of the University of Arkansas School of Law moderated a lively panel consisting of Adam Forman of Miller Canfield in Detroit, Steve Ury of the Service Employees International Union in Los Angeles, employee lawyer Kristin Case of Chicago, William Herbert of the New York Public Employee Relations Board, and in-house counsel Mark Howitson of Facebook and Gene Sheih of Wells Fargo.

The panelists discussed two major areas of concern for employees: accessing the Internet for personal use from an employer’s network or device and revealing information to an employer or potential employer through the use of social media.

While it is now fairly clear that e-mail sent from an employee’s work-related e-mail account is not private, it is less obvious whether employees are entitled to a reasonable expectation of privacy when they access a personal e-mail ac-

count through the employer’s network or on work time.

Although an employee’s private e-mail address may not be accessed directly from the employer’s server, as a work e-mail would, employers now have tools at their disposal to track employees’ “electronic footprint” of keystrokes. For example, an employer may utilize a “keylogger,” available as either hardware or software, which has the capability to record inputted passwords, login names, bank account numbers, credit card numbers, websites visited, and of course, messages typed in personal e-mails.

Some courts have found that e-mails exchanged between an employee and his lawyer can lose the protection of the attorney-client



Social media isn't a fad, it's a fundamental shift in the way we communicate.

—*Socialnomics.net*



privilege if sent via an employer’s network or device. Therefore, it is important to advise your employee clients to refrain from e-mailing you from a work e-mail address, on an employer’s device, or during work hours.

Regarding the use of social media websites, such as Facebook, Twitter, and LinkedIn, employees may not realize what they are revealing through seemingly innocuous social-networking activities. Even with privacy settings on a personal social media page, an employer can find a picture and

discern a potential employee’s age, gender, race, and so on. Posted affiliations with political or charity groups or associations can also reveal information that may influence an employee’s hiring or continued employment. For example, membership in the American Diabetes Association may (either rightly or wrongly) lead an employer to believe an employee has a disability.

For management lawyers, panelists urged employers to develop and effectively communicate clear policies in several key areas, including employer access to employee Internet usage, use of social media to research potential employees, and monitoring the use of social media by employees, particularly when it is used in ways that reflect or comment on the employer.

Although employers may have access to devices like keyloggers, they must also be aware that accessing certain information may constitute an unlawful invasion of privacy. For example, in a federal case in New Jersey an employer was found liable when he forced an employee to provide the password to an online forum coworkers created as a place to express frustration with management and then fired the participants. *See Pietrylo v. Hillstone Rest. Group*, 2009 WL 3128420 (D.N.J. Sept. 25, 2009).

An employer’s failure to monitor an employee’s conduct may also subject it to liability. For example, a New Jersey appellate court found an employer liable for failing to monitor its employees’ Internet use when an employee who had taken unlawful pictures of his stepdaughter used the employer’s computer to post the pictures on the Internet. The employer’s IT department had noticed the employee was accessing pornographic web pages while at work, and numerous complaints had been filed by fellow employees. The employer took no action aside from advising the employee to stop visiting inappropriate websites. The court found that when an employer knew or should have known an employee

was visiting child pornography websites at work, it had a further duty to investigate and report this behavior. *See Doe v. XYZ Corp.*, 887 A.2d 1156 (2005).

Employers should also develop policies regarding how social media is to be used in researching a potential or current employee. Although “googling” or otherwise looking up an employee may be both informative and tempting, employers should be aware that some social media have the capacity to track who has visited a particular website and which profiles were viewed. If an employer checks an employee’s social media page and then takes a negative action against that employee, the employee may be able to establish that the employer took the action based on information learned through the private site.

Should employees be permitted to “poke” each other? According to facebook.com, “the poke feature can be used for a variety of things. For instance, you can poke your friends to say hello.” Although the poke may seem fairly innocent, Facebook now has added “super pokes,” which allow users to give a “sucker punch,” to “tickle,” or to “throw a thong at” another. Should these “super pokes” be allowed among coworkers? Is it even for an employer to decide whether these behaviors are appropriate?

Social media is extremely fast-paced and constantly developing, and consequently, so is the law that deals with its use. Many of the cases dealing with social media have no precedent, and issues are being decided contradictorily in different jurisdictions. Employment lawyers will have to be aware and cautious of the issues that may arise regarding social media, as it and the law surrounding it develop. ■

Karen Kranson (kranson@pedowitzmeister.com) and **Marisa Warren** (marisa.warren@pedowitzmeister.com) are associates at Pedowitz & Meister in New York City.